



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

May 3, 2022

**ELECTRONIC SERVICE VIA EMAIL**  
**RETURN RECEIPT REQUESTED**

Harry Weiss  
Attorney for Tony Downs Food Co.  
Ballard Spahr  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, Pennsylvania 19103-7599

Re: Tony Downs Food Co., Madelia, Minnesota, Consent Agreement and Final Order  
Docket Nos. MM-05-2022-0006 CERCLA-05-2022-0007 EPCRA-05-2022-0008

Dear Mr. Weiss:

Enclosed please find a copy of the fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The U.S. Environmental Protection Agency has filed the original CAFO with the Regional Hearing Clerk on May 3, 2022.

Please have your client pay the Comprehensive Environmental Response, Compensation and Liability Act civil penalty in the amount of \$27,365 in the manner prescribed in paragraph 55 and your client's payment must reference with the billing document number 2752230B008 and the docket number CERCLA-05-2022-0007.

Please have your client pay the Emergency Planning and Community Right-to-Know Act civil penalty in the amount of \$66,996 in the manner prescribed in paragraph 57 and your client's payment must reference the docket number EPCRA-05-2022-0008.

Your client's payments are due on June 2, 2022.

Please feel free to contact James Entzminger at (312) 886-4062 if you have any questions regarding the enclosed document. Please direct any legal questions to Ian Cecala, Associate Regional Counsel, at (312) 353-5966. Thank you for your assistance in resolving this matter.

Sincerely,

Michael E. Hans, Supervisor  
Chemical Emergency Preparedness  
and Prevention Section

Enclosure

cc: Christopher Marnell (w/ enclosure)  
Division of Homeland Security  
and Emergency Management  
445 Minnesota Street, Suite 223  
St. Paul, Minnesota 55101  
[Christopher.Marnell@state.mn.us](mailto:Christopher.Marnell@state.mn.us)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

<b>In the Matter of:</b>	)	<b>Docket Nos.</b> MM-05-2022-0006 CERCLA-05-2022-0007 EPCRA-05-2022-0008
	)	
<b>Tony Downs Foods Co.</b>	)	<b>Proceeding to Assess a Civil Penalty Under</b>
<b>Madelia, Minnesota,</b>	)	<b>Section 109(b) of the Comprehensive</b>
	)	<b>Environmental Response, Compensation and</b>
<b>Respondent.</b>	)	<b>Liability Act, and Section 325(b)(2) of the</b>
	)	<b>Emergency Planning and Community Right-</b>
	)	<b>to-Know Act of 1986</b>

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**Consent Agreement and Final Order**  
**Preliminary Statement**

1. This is an administrative action commenced and concluded under Section 109(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. § 9609(b), Section 325(b)(2) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045(b)(2), and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant is, by lawful delegation, the Manager of Emergency Response Branch 1, Superfund & Emergency Management Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. Respondent is Tony Downs Foods Co., a Minnesota corporation doing business in the State of Minnesota.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and the terms of the CAFO.

**Jurisdiction and Waiver of Right to Hearing**

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

**Statutory and Regulatory Background**

9. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires any person in charge of a facility to immediately notify the National Response Center (NRC) as soon as that person has knowledge of any release of a hazardous substance from the facility in an amount equal to or greater than the reportable quantity of the hazardous substance.

10. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004, provide a mechanism to alert federal, state, and local agencies that a response action may be necessary to prevent deaths or injuries to emergency responders, facility personnel and the local community.

11. Section 304(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1), requires that the owner or operator of a facility must immediately provide notice, as described in Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), if a release of an extremely hazardous substance in quantities equal to or greater than a reportable quantity occurs from a facility at which hazardous chemicals

are produced, used, or stored and such release requires notice under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

12. Under Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), notice required under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), must be given immediately after the release by the owner or operator of a facility to the community emergency coordinator for the local emergency planning committee (LEPC) for any area likely to be affected by the release and to the state emergency response commission (SERC) of any state likely to be affected by a release.

13. Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), requires that, as soon as practicable after a release which requires notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), the owner or operator of the facility must provide written follow-up emergency notice setting forth and updating the information required under Section 304(b), 42 U.S.C. § 11004(b).

14. Under Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), with certain exceptions, the term “hazardous chemical” has the meaning given such term by 29 C.F.R. § 1910.1200(c).

15. Under 29 C.F.R. § 1910.1200(c), a hazardous chemical is any chemical which is classified as a physical or health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified.

16. Section 109(b) of CERCLA, 42 U.S.C. § 9609(b), Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), and 40 C.F.R. Part 19 authorizes U.S. EPA to assess a civil penalty of up to \$62,689 per day of violation, for violations of CERCLA Section 103 and EPCRA Section 304 that occurred after November 2, 2015, and for which penalties are assessed on or after January 12, 2022, or other amounts as penalty levels may be later adjusted at 40 C.F.R. Part 19.

### **Factual Allegations and Alleged Violations**

17. Respondent is a “person” as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
18. Respondent is a “person” as that term is defined under Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).
19. At all times relevant to this CAFO, Respondent was an owner or operator of the facility located at 418 Benzel Avenue, SW, Madelia, Minnesota (Facility).
20. At all times relevant to this CAFO, Respondent was in charge of the Facility.
21. Respondent’s Facility consists of a building, structure, equipment, storage container, or any site or area where a hazardous substance has been stored, placed, or otherwise come to be located.
22. Respondent’s Facility is a “facility” as that term is defined under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
23. Respondent’s Facility consists of buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites, and which are owned or operated by the same person.
24. Respondent’s Facility is a “facility” as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).
25. Anhydrous ammonia (CAS #7664-41-7) is a “hazardous substance” as that term is defined under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
26. Anhydrous ammonia (CAS #7664-41-7) has a reportable quantity of 100 pounds, as indicated at 40 C.F.R. Part 302, Table 302.4.

27. Anhydrous ammonia (CAS #7664-41-7) is classified as a physical or health hazard, a simple asphyxiant, or hazard not otherwise classified.
28. Anhydrous ammonia (CAS #7664-41-7) is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and 29 C.F.R. § 1910.1200(c).
29. At all times relevant to this CAFO, Respondent produced, used, or stored anhydrous ammonia at the Facility.
30. Anhydrous ammonia (CAS #7664-41-7) is an “extremely hazardous substance” pursuant to Section 302(a)(2) of EPCRA, 42 U.S.C. § 11002(a)(2).
31. Anhydrous ammonia (CAS #7664-41-7) has a reportable quantity of 100 pounds, as indicated at 40 C.F.R. Part 355, Appendix A.
32. On February 24, 2021, at or about 6:00 p.m. Central Time, Respondent became aware of a release above the reportable quantity of anhydrous ammonia (the release).
33. During the release, approximately 7,000 pounds of anhydrous ammonia emitted, leaked, discharged, or escaped into the ambient air.
34. In a 24-hour time period, the release of anhydrous ammonia exceeded 100 pounds.
35. The release is a “release” as that term is defined under Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
36. The release is a “release” as that term is defined under Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).
37. Respondent had knowledge of the release on February 24, 2021, at approximately 6:00 p.m., Central Time.

38. The release was one for which notice was required under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

39. The release required notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

40. The release was likely to affect Minnesota.

41. At all times relevant to this CAFO, the Minnesota SERC was the SERC for Minnesota under Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).

**Count 1 – Failure to Immediately Notify the NRC**

42. Complainant incorporates paragraphs 1 through 41 of this CAFO as if set forth in this paragraph.

43. Respondent notified the NRC of the release on February 25, 2021, at 10:55 a.m. Central Time.

44. Respondent did not immediately notify the NRC as soon as Respondent had knowledge of the release.

45. Respondent's failure to immediately notify the NRC of the release is a violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

**Count 2 – Failure to Immediately Notify the SERC**

46. Complainant incorporates paragraphs 1 through 41 of this CAFO as if set forth in this paragraph.

47. Respondent notified the Minnesota SERC of the release on February 25, 2021, at 10:38 a.m. Central Time.

48. Respondent did not immediately notify the SERC after Respondent had knowledge of the release.



49. Respondent's failure to immediately notify the SERC of the release is a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

**Count 3 – Written Notice to the SERC**

50. Complainant incorporates paragraphs 1 through 41 of this CAFO as if set forth in this paragraph.

51. Respondent provided written follow-up emergency notice of the release to the Minnesota SERC on November 18, 2021.

52. Respondent did not provide the SERC written follow-up emergency notice of the release as soon as practicable after the release occurred.

53. Respondent's failure to provide written follow-up emergency notice to the SERC as soon as practicable after the release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

**Civil Penalty**

54. Complainant has determined that an appropriate civil penalty to settle this action is \$27,365 for the CERCLA violation. In determining the penalty amount, Complainant considered the nature, circumstances, extent, and gravity of the violation, and with respect to Respondent, its ability to pay, prior history of violations, economic benefit or savings resulting from the violation, and any other matters as justice may require. Complainant also considered U.S. EPA's Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response Compensation and Liability Act, dated September 30, 1999 (EPCRA/CERCLA Enforcement Response Policy).

55. Within 30 days after the effective date of this CAFO, Respondent must pay a \$27,365 civil penalty for the CERCLA violation. Respondent must pay the penalty by submitting an electronic funds transfer, payable to “EPA Hazardous Substance Superfund,” and sent to:

Federal Reserve Bank of New York  
ABA No. 021030004  
Account No. 68010727  
33 Liberty Street  
New York, NY 10045  
SWIFT address: FRNYUS33

In the comment area of the electronic funds transfer, state the following: Tony Downs Foods Co., the docket number of this CAFO CERCLA-05-2022-0007, and the billing document number 2752230B008.

56. Complainant has determined that an appropriate civil penalty to settle this action is \$66,996 for the EPCRA violations. In determining the penalty amount, Complainant considered the nature, circumstances, extent, and gravity of the violations, and with respect to Respondent, its ability to pay, effect on ability to continue to do business, prior history of violations, economic benefit or savings resulting from the violations, and any other matters as justice may require. Complainant also considered U.S. EPCRA/CERCLA Enforcement Response Policy.

57. Within 30 days after the effective date of this CAFO, Respondent must pay a \$66,996 civil penalty for the EPCRA violations. Respondent must pay the penalty by submitting an electronic funds transfer, payable to “Treasurer, United States of America,” and sent to:

Federal Reserve Bank of New York  
ABA No. 021030004  
Account No. 68010727  
33 Liberty Street  
New York, NY 10045  
SWIFT address: FRNYUS33

In the comment or description field of the electronic funds transfer, state the following: Tony Downs Foods Co. and the docket number of this CAFO EPCRA-05-2022-0008.

58. Respondent must send a copy of the penalty payments to:

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

James Entzminger (SE-5J)  
Chemical Emergency Preparedness  
and Prevention Section  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Ian Cecala (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

59. This civil penalty is not deductible for federal tax purposes.

60. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States enforcement expenses for the collection action. The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

61. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date the

payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, U.S. EPA will assess a 6 percent per year penalty on any principal amount 90 days past due.

### **General Provisions**

62. The parties' consent to service of this CAFO by email at the following valid email addresses: cecala.ian@epa.gov (for Complainant) and weiss@ballardspahr.com (for Respondent).

63. Full payment of the penalty and compliance with this CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

64. This CAFO does not affect the rights of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

65. Respondent certifies that it is complying with Section 103(a) of CERCLA, 42 U.S.C. § 9603(a) and Section 304 of EPCRA, 42 U.S.C. § 11004.

66. This CAFO does not affect Respondent's responsibility to comply with CERCLA, EPCRA, and other applicable federal, state, and local laws and regulations.

67. This CAFO is a "final order" for purposes of U.S. EPA's EPCRA/CERCLA Enforcement Response Policy.

68. The terms of this CAFO bind Respondent and its successors and assigns.

69. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

70. Each party agrees to bear its own costs and attorney's fees in this action.

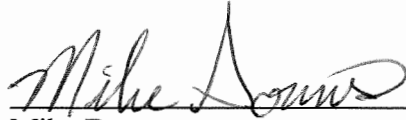
71. This CAFO constitutes the entire agreement between the parties.

**In the Matter of: Tony Downs Foods Co., Madelia, Minnesota**

**Docket No.** MM-05-2022-0006 CERCLA-05-2022-0007 EPCRA-05-2022-0008

**Tony Downs Foods Co., Respondent**

3/23/22  
Date

  
\_\_\_\_\_  
Mike Downs  
President  
Tony Downs Foods Co.

**U.S. Environmental Protection Agency, Complainant**


\_\_\_\_\_  
Date

**Jason El-  
Zein**

Digitally signed by  
Jason El-Zein  
Date: 2022.05.02  
06:12:05 -04'00'

\_\_\_\_\_  
Jason El-Zein, Manager  
Emergency Response Branch 1  
Superfund & Emergency Management Division  
U.S. Environmental Protection Agency  
Region 5

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Digitally signed by  
DOUGLAS BALLOTTI  
Date: 2022.05.02  
11:34:35 -05'00'

Douglas Ballotti  
Director  
Superfund & Emergency Management Division  
U.S. Environmental Protection Agency  
Region 5

**In the Matter of: Tony Downs Foods Co., Madelia, Minnesota**

**Docket No.** MM-05-2022-0006 CERCLA-05-2022-0007 EPCRA-05-2022-0008

**Final Order**

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

**ANN  
COYLE** Digitally signed  
by ANN COYLE  
Date: 2022.05.02  
15:06:05 -05'00'

\_\_\_\_\_  
Date

\_\_\_\_\_  
Ann L. Coyle  
Regional Judicial Officer  
U.S. Environmental Protection Agency  
Region 5

**In the Matter of: Tony Downs Foods Co., Madelia, Minnesota**

**Docket No.** MM-05-2022-0006 CERCLA-05-2022-0007 EPCRA-05-2022-0008

**Certificate of Service**

I certify that I sent a true and correct copy of the foregoing Consent Agreement and Final Order, which was filed on May 3, 2022 in the following manner to the addressees:

Electronic Service via E-Mail

Return Receipt Requested: Harry Weiss  
Attorney for Tony Downs Foods Co.  
Ballard Spahr  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, Pennsylvania 19103-7599  
weiss@ballardspahr.com

Copy by E-mail to  
Attorney for Complainant: Ian Cecala  
cecala.ian@epa.gov

Copy by E-mail to  
Regional Judicial Officer: Ann Coyle  
coyle.ann@epa.gov

Dated: \_\_\_\_\_

\_\_\_\_\_  
Isidra Martinez  
Acting Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5